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No. 08-1488

IN THE

Supreme Court of the United States

HK SYSTEMS, INC.,
Petitioner,

v.

EATON CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR HK SYSTEMS, INC.

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REPLY BRIEF FOR HK SYSTEMS, INC.

Respondent's opposition boils down to an argument that the questions presented in the petition are not really present in this case. Respondent is wrong for the following reasons:

Respondent tries to rewrite the procedural record and argue that this is a run-of-the-mill case of a district court reconsidering and granting summary judgment after trial, and thus "because HK was never entitled to a jury trial, any purported failure to consider 'trial evidence favorable to HK' is of no import." (Opposition ("Opp.") at 24.) Yet the District Court clearly stated that it considered the trial

evidence when it "reconsidered" its pre-trial denial of summary judgment:

> "In the days leading up to the trial, I began to suspect that in my pretrial rulings I had incorrectly and/or inadequately interpreted the indemnification provision. During trial these suspicions increased. *I have since examined the parties post-trial submissions and the trial record* and re-examined the parties earlier submissions, and my suspicion has become a conviction." (App. at 13a.) (Emphasis added.)

But as the Seventh Circuit observed, the District Court gave no weight to the trial evidence and it "did not bear on the judge's decision." (App. 5a.) That squarely conflicts with this Court's holding in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150-51 (2000) that a court must review "all" of the trial evidence of record and draw all reasonable inferences in favor of the nonmoving party when granting judgment as a matter of law after trial.

Respondent also argues that this case does not present the issue of whether a district court may sua sponte raise a new issue after trial that a party did not preserve in its Rule 50 motions for judgment as a matter of law. (Opp. at 1, 14-22.) In fact, the Seventh Circuit framed this case as presenting exactly that issue, stating that "by not preserving, in its [Rule 50] motion for judgment as a matter of law, its argument that HK was the author of its loss in the suit by IBP—which would have preserved the argument for appeal—Eaton took a big risk." (Petitioner's Appendix ("App.") at 3a.) The Court of Appeals, however, held that the District Court had discretion to "exercise mercy" and sua sponte raise the issue Respondent waived by never asserting: "Eaton failed

as we said to preserve its challenge to the alleged error (in denying its motion for summary judgment) in its [Rule 50] motion for judgment as a matter of law. So it had to throw itself on the judge's mercy. But the exercise of mercy was within his discretion." (App. at 4a.) The Seventh Circuit's holding that a district court can "exercise mercy" and raise a new issue the party waived by never raising in its Rule 50 motions conflicts with the decisions from at least five other Circuits.[1]

Respondent now suggests that Fed. R. Civ. P. 54(b)'s provision that a court may reconsider its orders at any time prior to judgment allows a district court to raise new issues after trial and disregard the trial evidence when vacating a jury verdict. (Opp. at 19.) Nothing in the plain language of Rule 54(b) allows a district court to disregard the trial evidence supporting a jury verdict; nor does it permit district courts to raise a new issue that a party waived under Rule 50. Indeed, Respondent cites no law holding that a district court may, after trial, disregard the trial evidence and consider a disputed pre-trial summary judgment record to determine whether to vacate a jury verdict. That is because no such law exists and the practice is contrary both to Rule 50 and to *Reeves*.

Respondent argues that HK waived this conflict with *Reeves*, asserting that HK never cited *Reeves* or argued below that a court must review the trial evidence and draw all reasonable inferences in favor of

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[1] Respondent now asserts that it actually raised the new issue the district court raised after trial. (Opp. at 13 n.3) This position lacks merit. Not only did the Seventh Circuit clearly find waiver, but Respondent is unable to quote any filing where it argued for the novel "superseding cause" theory the District Court sua sponte raised nearly a year after the jury verdict.

the nonmoving party when granting judgment as a matter of law after trial. (Brief in Opp. at 25.) Actually, HK *quoted Reeves* in its opposition to Respondent's Rule 50(b) motion in the District Court.[2] HK also raised the same arguments quoting post-*Reeves* Seventh Circuit cases in its initial and reply briefs in the Court of Appeals. (Petitioner's Supplemental App. ("Supp. App.") at 3a-5a.) HK further argued in its reply on appeal that "Eaton asks this Court to disregard HK's Seventh Amendment right to a jury trial" when it cited to and argued about "alleged 'facts' from documents and depositions not in the trial record," and that "Eaton's attempt to retry the case on appeal by citing evidence outside the trial record is an objectively unreasonable strategy that would trample HK's constitutional right to a jury trial and prejudice HK . . . . " (Supp. App. at 5a-6a.) Respondent's waiver argument lacks any merit and should not have been raised.

Respondent also argues there is no conflict with *Reeves* (or with cases from other Circuits holding that District Courts may not sua sponte raise new issues after trial), because *Reeves* and Rule 50 involve whether a party presented a sufficient evidentiary basis to support its case, while "[h]ere, because the only issue to resolve was a question of contract inter-

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[2] "'In entertaining a motion for judgment as a matter of law, the court should review all of the evidence in the record. In doing so, however, the court must draw all reasonable inferences in favor of the nonmoving party [here HK], and it may not make credibility determinations or weigh the evidence ... Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe.' *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 150-51, 120 S.Ct. 2097 (2000)." (Supp. App. at 1a-2a.)

pretation—the resolution of which falls exclusively to the court—there was no need for a trial, and therefore, no need to consider trial evidence." (Opp. at 27.) No one disputes that courts interpret contracts. But the District Court here did not simply interpret a contract. In a section of its opinion entitled "Application of Indemnification Provision to HK's Loss," the District Court made an explicit fact-based conclusion that "no reasonable jury" could find that Respondent's subsidiary caused HK's losses.[3] (App. 33a-37a.) Again, the trial "evidence did not bear on the judge's decision" on whether a reasonable jury could conclude that Respondent's subsidiary caused HK's losses, and the District Court treated the trial as "an irrelevance." (App. 3a, 5a.) Causation, that is whether HK's losses "resulted from" the conduct of Respondent's subsidiary, is indisputably an issue of fact under Wisconsin law. *Helmbrecht v. St. Paul Ins. Co.*, 122 Wis. 2d 94, 125, 362 N.W.2d 118 (1985) (causation is an issue for trier of fact). *See also McGrath v. Zenith Radio Corp.*, 651 F.2d 458, 469 (7th Cir. 1981) (same). The District Court's decisions ignoring and giving no weight to the trial evidence to decide the causation issue (and the Seventh Circuit's affirmance) plainly conflict with Rule 50 and this Court's decision in *Reeves*.

Respondent recognizes this conflict when it repeatedly states that the facts are "undisputed." Yet the "facts" Respondent cites in its opposition are not based on the evidence at trial. Instead, Respondent

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[3] The indemnity contract provided that Respondent "shall indemnify [HK] . . . and hold [it] harmless from and against any and all damages . . . of or against [HK] *resulting from* . . . (iii) any act or omission of [Eaton-Kenway] or Eaton . . . . " (App. 22a; emphasis added).

draws its "undisputed" facts from its pre-trial proposed findings of fact for summary judgment. (Opp. at 3.) And in labeling its pre-trial proposed findings of fact as "undisputed," Respondent misleadingly fails to cite HK's response disputing those proposed findings of fact (R.110), HK's additional proposed findings of fact to oppose summary judgment (R.109), or Respondent's response disputing HK's proposed findings (R.127). Respondent also ignores that the District Court concluded (before trial) that this pre-trial factual record was disputed and required trial. (Pet. App. at 55a & 57a.) Respondent's arguments about the facts being "undisputed" lack merit, are misleading, and highlight how the District Court (and the Court of Appeals) improperly ignored the trial evidence to conclude that no reasonable jury could find that Respondent's subsidiary caused HK's losses.

Also without merit is Respondent's argument that all of this is moot because the District Court allegedly granted summary judgment (after trial) under Fed. R. Civ. P. 56 and not Rule 50. (Opp. 14-15.) Respondent ignores that the District Court did consider the trial evidence, but gave it no weight. (App. 13a.) Nothing in Rule 56 allows a district court to ignore the trial evidence, vacate a jury verdict and grant judgment based on a disputed pre-trial fact record. To the contrary, Rule 56 "provides that disputed questions of fact ordinarily may not be decided on motions for summary judgment." *Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982). Nor does Rule 56 contemplate a party moving for "summary judgment" after trial based on information never admitted into evidence at trial, which is exactly what happened here. Respondent's arguments would render a jury trial and Rule 50 a nullity and only underscore the conflict with *Reeves* that a district court must view all

of the *trial evidence* in the light most favorable to the nonmoving party when deciding whether to grant judgment as a matter of law.

Finally, Respondent raises the incredible argument that HK suffered no prejudice. (Opp. at 23.) HK has a Seventh Amendment right to have a jury decide the disputed causation issue, a right under Rule 50 to fair notice of arguments its opponent would raise so it could address any evidentiary issues before submitting the case to the jury, and a right under Rule 50, the Seventh Amendment, and *Reeves* to have the District Court consider all of the trial evidence and draw all reasonable inferences in HK's favor when considering Respondent's motion for judgment as a matter of law. Yet the District Court made a finding of fact on causation, treated the trial as an irrelevance, and vacated the jury verdict based on a new issue HK had no notice of and Respondent never raised at or before trial. On appeal, Respondent argued that the trial evidence was irrelevant and the "district court's factual findings on mixed questions of law and fact are reviewed under the deferential standard of clear error." (App. 69a-70a.) The Seventh Circuit then affirmed. The fact that HK "lost" based on a factual record other than the record developed at trial is per se prejudice and reason enough to grant the petition.[4]

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[4] Also without merit is Respondent's argument that HK "received notice of the district court's intention to reconsider its prior rulings thereby barring its prejudice assertions." (Opp. at 23.) The District Court announced its "intention to vacate the jury verdict and issue a decision reversing its earlier interpretation of the contract" during a telephonic conference on the afternoon of Friday, June 15 (R. 382), and then on Monday, June 18, issued an order explaining its decision. HK had no prior notice of the District Court's decision, let alone notice before the close of evidence.

CONCLUSION

Respondent does not dispute that if the District Court sua sponte raised a new issue after trial, and then used this new issue to grant judgment as a matter of law on the fact-based issue of causation without giving any weight to the trial evidence, then the Seventh Circuit's affirmance conflicts both with decisions from at least five other Circuits as well as this Court's decision in *Reeves*. Nor does Respondent deny that such conflicts present important and substantial questions. Instead, Respondent resorts to misrepresentations to distort the record and improperly argue no conflict exists. In light of Respondent's inability to face the issues presented in the petition without gross distortions of the record, the need for plenary review of the decision below is indisputable. The petition for writ of certiorari should be granted. Indeed, HK suggests that summary reversal is now in order given the clear conflict with *Reeves*.

Respectfully submitted,

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APPENDIX

APPENDIX A

* * *

A. THE WISCONSIN STANDARD

Under the Wisconsin standard, a motion challenging the sufficiency of the evidence must be denied unless "the court is satisfied that, considering all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made [here HK], *there is no credible evidence* to sustain" the verdict. Wis.Stat. § 805.14(1)(emphasis added). Thus, "'[i]f there is any evidence which, under any reasonable view, fairly admits of an inference that supports a jury's finding, that finding may not be overturned.'" *General Star Indem. Co. v. Bankruptcy Estate of Lake Geneva Sugar Shack,* 215 Wis. 2d 104, 122, 572 N.W.2d 881 (Ct. App. 1997) (reviewing the grant of a motion to change the verdict on the ground of sufficiency of the evidence under Wis. Stat. § 805.14(5)(c)) (quoting *Foseid v. State Bank of Cross Plains,* 197 Wis. 2d 772, 787, 541 N.W.2d 203 (Ct. App. 1995)). The "credible evidence" test of section 805.14(1) is more stringent than the "great weight of the evidence" test. *Sievert v. American Fam. Mut. Ins. Co.,* 180 Wis. 2d 426, 433-34, 509 N.W.2d 75 (Ct. App. 1993), *affirmed,* 190 Wis. 2d 623, 528 N.W.2d 413 (1995). As such, even if the jury's verdict is "against the great weight of the evidence" but, nonetheless, is supported by some "credible evidence," a motion for judgment as a matter of law must be denied. *Id.* at 433-34.

B. THE FEDERAL STANDARD

"In entertaining a motion for judgment as a matter of law, the court should review all of the evidence in

the record. . . . In doing so, however, the court must draw all reasonable inferences in favor of the non-moving party [here HK], and it may not make credibility determinations or weigh the evidence . . . Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe." *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 150-51, 120 S.Ct. 2097 (2000).

APPENDIX B

* * *

depriving it of the opportunity to prepare and present evidence on this new issue and new standard at trial. Either reason is sufficient to reverse the judgment and reinstate the jury verdict.

ARGUMENT

I. The court should reverse and reinstate the jury verdict.

A. Standard of review.

There was a jury trial and verdict. Thus, this Court should review the district court's decision granting summary judgment post-jury verdict as if it were reviewing a decision granting judgment as a matter of law under Rule 50, *i.e.,* the decision is reviewed de novo viewing the trial evidence in the light most favorable to HK. *Learning Curve Toys, Inc. v. PlayWood Toys, Inc.,* 342 F.3d 714, 721 (7th Cir. 2003). "We shall not second-guess the jury's view of the contested evidence; the proper inquiry is whether, given the totality of the evidence, [HK] presented sufficient evidence from which a reasonable jury could find in [its] favor." *Id. See also U.C. Castings Co. v. Knight,* 754 F.2d 1363, 1369 (7th Cir. 1985) ("Because great deference is accorded to the jury's judgment in this circuit, it is well-established that a jury verdict will not be set aside if a reasonable basis exists in the record to support that verdict.").

Finally, Section 13.10 of the APA provides that Wisconsin law governs the interpretation of the indemnification agreement. (App.255).

B. The jury verdict is supported by ample trial evidence, much of it undisputed.

This case is about whether Eaton breached its indemnity agreement when it refused to indemnify HK after IBP sued HK. The IBP project was one of the pending

APPENDIX C

* * *

Platinum Tech., Inc. v. Fed. Ins. Co., 282 F.3d 927, 931 (7th Cir. 2002), concerns appellate review following a bench trial. This case involves review of a jury trial and verdict. As for Eaton's waiver argument, HK objected to the post-trial summary judgment process, filed a Rule 11 motion, and refused to respond to Eaton's alleged findings of "undisputed fact" citing information outside the trial record. (R.371, 366). HK never waived its positions.

This Court should review Judge Adelman's decision as if it were reviewing a decision granting judgment as a matter of law under Rule 50, *i.e.*, the court reviews "the conclusions of the district court de novo, taking the evidence in the light most favorable to the nonmoving party" and keeping in mind that "[j]udgment should be entered under Rule 50(a) only where the evidence 'is so one-sided that one party must prevail as a matter of law.'" *Klunk*, 170 F.3d at 775 (citation omitted).

B. The Court should strike Eaton's alleged "facts" and arguments based on evidence not before the jury at trial.

Eaton asks this Court to disregard HK's Seventh Amendment right to a jury trial and repeatedly cites to and argues about alleged "facts" from documents and depositions not in the trial record. Throughout its Statement of Facts, Eaton repeatedly cites "D.I.97," its pre-jury trial August 2005 "Statement of Uncontested Facts in Support of [Eaton's] Summary Judgment Brief." (Eaton never cites HK's response disputing those proposed findings of fact (R.110), which also is not in the trial record.) Eaton also cites,

inter alia, "D.I.262," Eaton's pretrial report, and "D.I.126,' Eaton's October 2005

* * *

summary judgment reply brief. Indeed, Eaton even cites "D.I.97," not the trial record, to argue that the trial record does not support the jury verdict because "HK and Alvey gave IBP assurances that a future simulation would demonstrate the requisite throughput capacity, and further assured IBP that they would remedy the system if the simulation failed to show capacity." Resp.54. Worse, Eaton never mentions that HK contested that proposed "fact," (R.110:40), or that Eaton's contested finding cites deposition testimony of a witness, Phillip McCall, who testified at trial, (R.350:297).

Eaton's attempt to retry the case on appeal by citing evidence outside the trial record is an objectively unreasonable strategy that would trample HK's constitutional right to a jury trial and prejudice HK, which cannot possibly rebut all of Eaton's purported "facts" in the limited space of a reply. Nor should HK bear that burden. This Court reviews a decision vacating a jury verdict "on the basis of the evidence the jury actually had before it." *Filipovich v. K & R Exp. Systems, Inc.*, 391 F.3d 859, 863 (7th Cir. 2004) ("Unlike our review of a summary judgment motion, however, review of a Rule 50 motion proceeds on the basis of the evidence the jury actually had before it."). This Court has made clear that "[f]ollowing a jury trial, we do not re-weigh evidence, nor do we make credibility determinations," *id.*, but that is exactly what Eaton seeks. The Court should strike Eaton's "Statement of Facts" and other arguments based on "evidence" not before the jury. Eaton has only itself to blame if that means its brief falls by the wayside.